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In The
Supreme Court of the United States

MARION WILSON,

Petitioner,

v.

ERIC SELLERS, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONER

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I. Neither the text of 28 U.S.C. § 2254(d), nor this Court's jurisprudence, permits a federal court to ignore an observably defective state-court "opinion" in favor of imagined, *post hoc* justifications for the resulting state-court "decision."

For more than twenty-five years, the "look-through" methodology of *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991), has been used by federal habeas courts to discern the meaning of unexplained state-court decisions and thus facilitate accurate and informed, properly limited review of those decisions. The Warden's brief does not seriously dispute the efficacy of looking-through as a means of identifying the basis for an appellate court's summary order, nor does it seek to disprove this Court's probabilistic assessment that the "maxim . . . that silence implies consent" is "generally" correct. *Id.* Instead, in a dramatic shift of position from Georgia's previous submissions in this and numerous other cases, the Warden insists that none of this matters after AEDPA because 28 U.S.C. § 2254(d) analysis is concerned exclusively with the state-court "decision" – *i.e.*, the *result*, not its underlying analysis or rationale. Therefore, federal courts reviewing state-court decisions are not only free but obliged to ignore objectively unreasonable state-court legal conclusions and factual determinations – however explicitly the state court explains that these are the reasons for its ultimate ruling – in favor of speculation seeking other justifications for denying relief.

The central pillar of the Warden's argument, rephrased and repeated throughout its brief, is that "the text of [28 U.S.C.] § 2254(d) does not call for review of a state court's *reasoning*. Section 2254(d) requires only that the federal habeas court apply its deferential standard to the 'decision'," Resp. Br. 26, which "is not the same thing as an 'opinion' . . . ," *id.* at 1. "Section 2254(d) tells the federal court to review a 'decision' that resulted from the adjudication, not an 'opinion' or 'reasoning.'" *Id.* at 22.[1]

The Warden's novel conception of § 2254(d)'s operation requires outright *defiance* of the statute Congress enacted. If, as the Warden insists, "decision" does not mean "opinion," and only the "decision" matters under § 2254(d), then it is no more permissible for a federal habeas court to scrutinize the reasoned "opinion" of a state's *highest* court than it would be to review the "opinion" of a lower state court using *Ylst*'s look-through method. Thus, federal courts would be obliged

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[1] This contention is not simply the Warden's leading argument; it is reiterated twenty-four times throughout the Respondent's brief and used to prop up every other argument offered. *See, e.g.*, "But if § 2254(d) requires review of a 'decision' and does not require review of any 'opinion,' it cannot require reviewing only a lower state court's opinion just because a higher state court provided only a summary decision." Resp. Br. 27. "Section 2254(d)'s focus on state courts' decisions rather than their reasoning reflects AEDPA's rejection of a 'grading papers approach' to federal habeas review of state-court adjudications." *Id.* at 33. "Nothing in AEDPA permits federal courts to review only 'the last reasoned state court decision' . . . as a proxy for reviewing the 'last state-court adjudication on the merits' that is the sole focus of § 2254(d)'s deferential review." *Id.* at 45.

to willfully ignore even the most explicitly contrary-to-law or unreasonable *ratio decidendi*, no matter how clearly spelled out in a state supreme court's "opinion" supporting a "decision" to deny (or affirm the denial of) relief, so long as a different rationale, imagined *post hoc* by the federal court, might have supported the outcome.[2]

That approach cannot be reconciled with the statute as Congress wrote it. The plain language of § 2254(d) conditions the availability of relief in a habeas case on whether the state-court "decision" exhibits one or more of the defects enumerated in subparts (d)(1) and (d)(2), *i.e.*, a decision "contrary to" law, "involv[ing] an unreasonable application of" law, or "based on an unreasonable determination of the facts." A state-court "opinion" confirming, by its very terms, the presence of such a defect necessarily satisfies the only requirement Congress chose to adopt. Nothing in the statute – including the word "decision" – can be read to permit, let alone compel, a federal court to turn a blind eye to such incontestable proof of a material state-court deviation from reason.

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[2] The Warden's criticism of the look-through method also includes a complaint that applying it for § 2254(d) analysis would "put federal courts back in the paternalistic relationship to state courts AEDPA was designed to end." *Id.* at 33. Little, however, could be more paternalistic than to mandate that federal habeas courts disregard the considered and reasoned decision of a state's lower court in favor of the ostensibly superior imagination of the federal court itself.

This commonsense understanding of the words Congress wrote is reflected in an unbroken line of this Court's decisions interpreting and applying § 2254(d). It began with the seminal decision in (*Terry*) *Williams v. Taylor*, 529 U.S. 362 (2000), which established that, if a state-court's opinion explicitly articulates the wrong legal standard in reaching its decision, that "decision will certainly be contrary to" law within the meaning of § 2254(d)(1). *Id.* at 405. Because the Virginia Supreme Court's opinion revealed exactly such an error, its "analysis" was held to be "'contrary to' . . . the clear law as established by this Court." *Id.* at 397. Three years later, in *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court's determination that the Maryland Court of Appeals' decision involved an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), relied entirely upon the state-court's "opinion," which "sp[oke] for itself" to reveal an erroneous factual assumption that distorted its analysis. *Wiggins*, 539 U.S. at 530; *see also id.* at 531 (adding that a "subsequent statement" in the state-court opinion "underscores" and "further confirms" the inappropriate assumption). More recently, in *Lafler v. Cooper*, 566 U.S. 156, 173 (2012), the Michigan Court of Appeals' "decision" was held to be "contrary to" federal law because its opinion "stat[ed] the incorrect standard," "made an irrelevant observation," and "mischaracterized [the habeas petitioner's] claim." And again just two years ago, in *Brumfield v. Cain*, ___ U.S. ___, 135 S. Ct. 2269 (2015), this Court focused its § 2254(d)(2) inquiry on the "state trial court's reasoned decision,"

and held that "the two underlying factual determinations on which the trial court's decision was premised" were objectively unreasonable. As these examples[3] illustrate with vivid clarity, "review under § 2254(d)[] focuses on what a state court knew and did," *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011); and the best, most obvious source by which to inform that review is the state-court's own opinion.

II. *Greene v. Fisher*, 565 U.S. 34 (2011), did not address, let alone foreclose, looking through to a reasoned state-court decision.

The Warden's brief does not acknowledge or address any of this Court's undeniably reasoning-centered § 2254(d) decisions,[4] nor does it attempt to explain how overlooking an explicitly contrary-to-law or unreasonable state-court decision might be reconciled with the statute's clear command. Instead, the Warden argues from the other direction, insisting that § 2254(d) permits review of only *one* state-court merits decision – the most *recent* one – and that, where that

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[3] They are only examples. *See, e.g., Brewer v. Quarterman*, 550 U.S. 286, 293 & n.5 (2007); *Porter v. McCollum*, 558 U.S. 30, 42-44 (2009), and the cognate decisions of this Court collected at Pet. Br. 25 n.12, and 40.

[4] In fact, the closest the Warden gets to the analyses this Court has modeled is to indirectly denigrate them as reflecting an "outmoded approach" based on "grading papers" and "pick[ing] apart state courts' opinions. . . ." Resp. Br. 34-35.

adjudication results in a summary decision, *Harrington v. Richter*, 562 U.S. 86 (2011), dictates the exclusive method of analysis.

The linchpin of this argument, asserted again and again throughout the brief, *see* Resp. Br. 1, 2, 21, 27, 28, 30, 35, 45, 56, is that, when *Greene v. Fisher*, 565 U.S. 34, 40 (2011), made reference to "the last state-court adjudication on the merits," it erected an impermeable barrier to consideration under § 2254(d) of anything beyond the most recent state-court merits disposition, summary or not. *See, e.g.*, Resp. Br. 2 ("But again: AEDPA requires the federal court to evaluate the *last* state-court merits *decision*. Nothing in AEDPA directs habeas review to a lower state-court's opinion just because the last state-court merits decision is summary."). As even a cursory review of *Greene* quickly reveals, however, it implied nothing of the sort, and the phrase ("last state-court adjudication on the merits") around which the Warden builds his entire argument has been taken completely out of context.

Greene had nothing to do with whether federal courts should consider the reasoning or only the result of a state-court adjudication. Nor did this Court's decision in *Greene* so much as suggest, let alone hold, that looking through a summary order to an anterior, reasoned decision would contravene § 2254(d). Rather, *Greene*'s sole concern was whether a rule announced after a lower state court rendered the only merits adjudication of the prisoner's claim, but before the state's highest court chose not to decide the claim, could constitute "clearly established federal law" within the

meaning of § 2254(d)(1). *See Greene*, 565 U.S. at 36-37. This Court held that it could not, and explained that, because "the last state-court adjudication on the merits" had "predated" announcement of the rule on which the habeas petitioner sought to rely, it simply could not qualify as "'clearly established Federal law' against which [to] measure the [state court] decision." *Id.* at 40. Seen in this light, the phrase plucked out of context and made the keystone of the Warden's argument sheds no light whatsoever on the issues presently before the Court. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 71 (2004).[5]

In fact, read fairly, *Greene* supports Wilson's position. It reflects the undeviating approach of this Court's AEDPA jurisprudence in making state-court decisionmakers' considered reasoning the crux of § 2254(d) reasonableness review. Had it been accepted, the petitioner's argument in *Greene* would have

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[5] At Resp. Br. 56, the Warden yokes *Greene* with *Harrington v. Richter*, 562 U.S. 86 (2011), to argue that AEDPA requires federal habeas courts to ignore the reasoning upon which state courts explicitly ground their decisions in "determining whether the petitioner has met his burden of showing that 'no reasonable basis' 'could have supported' [the] . . . 'last state-court adjudication on the merits.'" But *Richter* lends as little support as *Greene* to this proposed procedure of deliberate blindness to state-court opinions which demonstrate on their face that the considerations which were thought to dictate decision are unreasonable. In *Richter*, the "last state-court adjudication" was also the *only* state-court decision of Richter's federal claim, and it was announced with no stated reasons that could be reviewed for unreasonableness. *See* Pet. Br. 28-33. Similarly, in none of the lower federal-court decisions which *Richter* cited with approval (559 U.S. at 98) were there any reasoned state-court opinions.

opened the door to criticism (or worse) of a state-court decision on the basis of information that, through no fault of the state court itself, could not have been part of its analysis. As this Court recognized, that form of scrutiny had already been rejected in *Cullen v. Pinholster*, 563 U.S. 170 (2011), which "explained [that] § 2254(d)(1) requires federal courts to 'focu[s] on what a state court knew and did'. . . ." *Greene*, 565 U.S. at 38 (quoting *Pinholster*, 563 U.S. at 182). If the Warden here were correct that § 2254(d) begins and ends with the federal court's ability to imagine a plausible justification for the state-court outcome, there would have been no need for this Court to emphasize and re-emphasize the centrality of the state-court's knowledge and actions in *Pinholster* and *Greene*.

III. Endorsing the look-through method for § 2254(d) cases is neither unfair nor unduly burdensome to state courts.

The Warden also asserts that use of the look-through method for § 2254(d) analysis is "unsound" because it preferences the "maxim . . . that silence implies consent, not the opposite," *Ylst*, 501 U.S. at 104, over the assertedly "more accurate presumption . . . that higher state courts know and follow the law and have denied relief on a reasonable basis if one exists." Resp. Br. at 46. That criticism is misguided.

While the Warden complains bitterly about the prospect of presuming that a higher state-court's unexplained affirmance of a reasoned lower-court order

reflects an endorsement of that order's content, the only basis he offers for questioning the operational soundness of *Ylst*'s maxim is his own preference for a different one. That is not enough. Although the Warden does not acknowledge it, the balance of costs and benefits attending the two presumptions tilts sharply in favor of looking through. In the Warden's ledger, expecting a state appellate court that has recognized a serious constitutional error in an inferior court's decision to *say* so would impose upon the state judiciary a burden too heavy or insulting to bear – even though such a comment could often be expressed in a sentence or two. *Cf. Harris v. Reed*, 489 U.S. 255, 264 (1989); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

The cost of avoiding that burden, however, would be substantially heavier. Rather than organizing their arguments and analyses around the readily discernable bases set forth in the reasoned decision of the lower state court, the parties and the federal courts would instead be required to take on the far more extensive, time-consuming, and costly work of imagining, arguing and resolving the entire range of *potential* alternative bases on which the state appellate court *might* have ruled. And instead of affording the parties and the federal courts a fair assurance that prejudicial constitutional error did not go unreasonably without redress, the most the Warden's process could offer would be the cold comfort that such *might* be the case. Thus, if the objective is to maximize the likelihood of an accurate result – *i.e.*, the provision of a remedy for challenges meeting § 2254(d)'s "difficult" standard, *Richter*, 562

U.S. at 102 – looking through to a reasoned order susceptible to the form of analysis this Court has demonstrated in *Williams*, *Wiggins* and other cases is the only plausible choice.

Respectfully submitted,

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